STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JARMAINE A. CARROLL,

Defendant-Appellant.

UNPUBLISHED
October 23, 2001

No. 220556
Wayne Circuit Court
LC No. 98-009267

Before: McDonald, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of conspiracy to commit armed robbery, MCL 750.157a and 750.529. The trial court sentenced him to fifteen to thirty years' imprisonment. We affirm.

Defendant first argues that the trial court erred in denying his motion for a mistrial after two members of the jury allegedly were harassed during a break in deliberations. We disagree. We review a trial court's decision to grant or deny a motion for a mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). An abuse of discretion occurs if an unbiased person, considering the facts on which the trial court relied, would conclude that there was no justification for the ruling made. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997).

Defendant contends that the trial court should have granted his motion for a mistrial because the harassment experienced by the two jurors created a potential for juror bias against him and denied him his right to an impartial jury. The record revealed, however, that the two jurors were not biased against defendant as a result of the contacts and that the encounters had no impact on the jurors' decisions. In fact, there was no indication that either defendant or his family was involved in either incident. Contrary to defendant's argument, we conclude that the trial court's inquiry of the two jurors regarding whether the encounters had any impact on the verdicts[1] was a sufficient and appropriate response to the potential problem. See, e.g., *People v*

[1] We note that unlike in *People v Levey*, 206 Mich 129, 130; 172 NW 427 (1919), the trial
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Schram, 378 Mich 145, 160-161; 142 NW2d 662 (1966). Because the jurors indicated that the encounters had not affected their decisions, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Defendant next contends that he was denied a fair trial because he was required to appear before the jury wearing handcuffs. We disagree. The decision to restrain a defendant is reviewed "for an abuse of discretion under the totality of the circumstances." *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). To obtain the reversal of a conviction on the basis that he was handcuffed in the presence of the jury, a defendant must establish that he was prejudiced by the exposure. *People v Moore*, 164 Mich App 378, 384-385; 417 NW2d 508 (1987), modified on other grounds 433 Mich 851 (1989).

The record reveals no basis for relief. The situation is analogous to that in *People v Herndon*, 98 Mich App 668, 673; NW2d (1980), in which the Court stated:

> Although evidence in the record indicates that defendant may have been in the presence of the jury while in handcuffs, there is no evidence that would indicate that any member of the jury ever saw handcuffs on defendant. Further, defense counsel did not request an evidentiary hearing to inquire as to whether members of the jury saw shackles on defendant and, if they did, whether they were thereby prejudiced. See, *People v Panko*, [34 Mich App 297; 191 NW2d 75 (1971)] . . . . In the absence of such an evidentiary record we are unable to hold that defendant was denied his right to a fair and impartial jury.

Similarly, in this case, there is no evidence on the record that a juror who actually deliberated defendant's case saw him in handcuffs. Moreover, and significantly, the trial court instructed the jury panel not to draw any negative inferences from the fact that defendant was in custody and specifically asked the prospective jurors if anyone thought that defendant was more likely to be guilty of an offense because he was in custody. None of the prospective jurors responded affirmatively to the trial court's questioning. Accordingly, defendant has not established prejudice and is not entitled to relief. See *Moore, supra* at 384-385.

Defendant next argues that the prosecutor committed misconduct requiring reversal by eliciting testimony about an immunity agreement from prosecution witness Elisia Brockington and by vouching for Brockington's credibility during opening, closing, and rebuttal arguments. However, defendant did not object to the prosecutor's allegedly improper conduct. "Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 310 (2000). Accordingly, to warrant relief defendant must show (1) that an error occurred; (2) that the error was plain, i.e., clear or obvious; and (3) that the plain error affected substantial rights, i.e., that it affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

(…continued)

court's inquiry in the instant case, which occurred the same day the jury delivered its verdict, was addressed to the two jurors that had allegedly been approached.

"Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). A prosecutor may not intimate that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, a mere reference to a plea agreement containing a promise for truthfulness does not in itself require reversal. *Bahoda, supra* at 276. Although such agreements should be admitted with caution, their admission is not error unless used by the prosecutor to suggest that the government had some special knowledge that the witness was testifying truthfully. *Id.*; *People v Turner*, 213 Mich App 558, 584-585; 540 NW2d 728 (1995).

Contrary to defendant's argument, the prosecutor's questioning of Brockington on direct examination did not constitute an obvious error. The prosecutor did not suggest that she had some special knowledge, unknown to the jury, that Brockington was testifying truthfully. *Bahoda, supra* at 276; *Turner, supra* at 585. Rather, the prosecutor simply reminded Brockington that she was required to testify truthfully pursuant to the immunity agreement. The prosecutor's questioning in this regard does not require reversal.[2]

Defendant also argues that the prosecutor improperly vouched for Brockington's truthfulness by making two different comments in her initial closing argument. We disagree with respect to one of the comments. Indeed, in stating that Brockington had a deal to "[t]ell the truth," the prosecutor was simply commenting on the evidence introduced at trial. This was not erroneous. See, e.g., *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). The prosecutor did improperly vouch for Brockington's credibility, however, when she stated that Brockington "was being truthful when she testified" before the jury. However, notwithstanding the fact that this comment was improper, reversal is not required. As noted earlier, to obtain relief for this unpreserved claim of error, defendant must show that the error affected the outcome of the lower court proceedings. *Carines, supra* at 763.

Defendant is unable to make this showing. The evidence against him was sufficiently strong such that the prosecutor's brief comment, viewed in light of the whole trial, did not affect the outcome. For example, Brockington's testimony that defendant and three other men conspired to commit armed robbery in the Eagle Market was corroborated by Samir Dawood, the store's manager, who detailed the commission of the robbery. Dawood heard someone referring to "Jam" during the robbery, and Brockington testified that defendant was known as "Jam." Thereafter, the fingerprints of one of the men named by Brockington were recovered from the

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[2] We acknowledge that in *Bahoda*, in which the Court affirmed the defendant's conviction, the prosecutor's elicitation of testimony occurred during redirect examination in response to defense arguments, whereas in the instant case, the challenged questioning of Brockington occurred during the prosecutor's direct examination. We do not find this distinction to require reversal here. Indeed, *Bahoda* makes clear that testimony about a plea agreement does not require reversal as long as it does not "convey a message to the jury that the prosecutor had some special knowledge or facts indicating the witness' truthfulness." *Bahoda, supra* at 277. The questioning of Brockington in this case, even though it occurred on direct examination, did not convey such special knowledge.

cellophane wrappers of the lottery tickets stolen during the armed robbery. Moreover, we note that although the prosecutor's comment was improper, the trial court instructed the jury that the attorneys' arguments were not evidence. Finally, and significantly, the jury had already been informed, through the *proper* questioning of Brockington, that she was required to testify truthfully. Accordingly, defendant has not established that the prosecutor's brief improper statement during her initial closing argument affected the outcome of the proceedings, and reversal is unwarranted. *Id*.[3]

Defendant also argues that the prosecutor improperly bolstered Brockington's credibility during her rebuttal argument. However, the record shows that in making the challenged comments, the prosecutor was simply commenting on the evidence properly presented at trial concerning Brockington's immunity agreement. A prosecutor may properly comment about and draw inferences from the evidence adduced at trial. *Vaughn*, *supra* at 39. In addition, we note that the prosecutor was responding to the closing argument of defendant's attorney, who suggested that Brockington was required to conform her testimony to her statements to police even though the statements may not have been entirely true. An impermissible remark made by a prosecutor in response to a comment previously made by defense counsel does not require reversal. *Id*. In any event, the prosecutor did not suggest that she had some special knowledge that Brockington was testifying truthfully. *Bahoda*, *supra* at 276; *Turner*, *supra* at 585. Therefore, the prosecutor's rebuttal argument was not improper.

Defendant further contends that the prosecutor improperly vouched for Brockington's credibility in her opening statement. The portion of the statement cited by defendant, however, reveals no impropriety. The prosecutor merely stated that although the immunity agreement was entered into in exchange for truthful testimony, the jurors should view Brockington's testimony more carefully than that of the other witnesses because she was an accomplice. As such, the statement did not constitute improper vouching for Brockington's truthfulness.

Next, defendant argues that he was deprived of his Sixth Amendment right to counsel when the trial court reinstructed the jury in the absence of defense counsel. We disagree. Whether a defendant was denied his Sixth Amendment right to counsel is a constitutional issue. This Court reviews constitutional issues de novo. *People v Brown*, 239 Mich App 735, 750; 610 NW2d 234 (2000).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the assistance of counsel for his defense. *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). The right to counsel attaches when an adversary criminal proceeding is commenced against a defendant by a formal charge, a preliminary hearing, an indictment, an information, or an arraignment. *Id*. at 376-377. Once the right attaches and a defendant asserts his right to counsel, the Sixth Amendment provides that he must be afforded counsel at all critical stages of the proceedings. See *id*. at 377. A critical stage in the proceeding is one in

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[3] We additionally note that reversal is unwarranted because an immediate objection and a cautionary instruction could have cured any potential prejudice resulting from the prosecutor's remark. See *People v Slocum*, 213 Mich App 239, 241; 539 NW2d 572 (1995).

which "counsel's absence might derogate from the defendant's right to a fair trial." *People v Barnett*, 163 Mich App 331, 335; 414 NW2d 378 (1987).

While the jury's reinstruction was a critical stage of the proceeding because counsel's absence could have detracted from defendant's right to a fair trial, the record reveals that defendant was not denied his right to counsel during the reinstruction. Defense counsel thanked codefendant William Thompkin's attorney for standing in for him during the reinstruction, and Thompkin's attorney objected to the conspiracy instruction on behalf of both defendant and Thompkins. In addition, the trial court acknowledged that Thompkin's attorney "stood in" for defense counsel during the reinstruction. Therefore, because defendant was represented by counsel during the reinstruction, he was not deprived of his Sixth Amendment right to counsel.

Defendant next argues that the cumulative effect of the errors during his trial denied him a fair trial. We disagree. While a single error may not justify reversal, the totality of errors may justify reversal if a defendant is denied a fair trial. See *People v Skowronski*, 61 Mich App 71, 77, 232 NW2d 306 (1984). Here, we find no such deprivation, and reversal therefore is unwarranted.

Finally, defendant argues that his sentence is disproportionate. We again disagree. We review sentencing decisions for an abuse of discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993), overruled on other grounds *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996). If the principle of proportionality – which dictates that a sentence be proportionate to the seriousness of the crime and the defendant's prior record and circumstances – is violated, an abuse of discretion has occurred.[4] *People v Bennett*, 241 Mich App 511, 515; 616 NW2d 703 (2000).

When imposing a sentence, the trial court may consider the severity and nature of the crime, the circumstances surrounding the criminal behavior, the defendant's attitude toward his criminal behavior, the defendant's social and personal history, and the defendant's criminal history. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). In addition, while a trial court may not make an independent finding of guilt with respect to a crime for which a defendant has been acquitted and then sentence the defendant on the basis of that finding, it may consider the evidence offered at trial, "including other criminal activities established even though the defendant was acquitted of the charges." *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). It may also consider the effect of the crime on the victims. *Id*.

Here, while the trial court did not make an independent finding that defendant committed assault with intent to murder, with which he was charged and acquitted, the court recognized that the armed robbery culminated with one of the coconspirators shooting Dawood in the leg while Dawood was on the floor cooperating with them. The court acknowledged that it did not know which of the coconspirators had shot Dawood. The court also considered the evidence that the coconspirators aided and abetted each other in striking an Eagle Market employee, George Matti,

[4] We note that there were no sentencing guidelines for the conspiracy conviction.

in the face with a gun and pistol-whipping him. Consideration of the shooting and the circumstances of the armed robbery was proper in determining defendant's sentence. *Oliver*, *supra* at 98; *Compagnari*, *supra* at 236. The court further acknowledged that all three defendants participated in conspiring to commit the armed robbery and that all three defendants planned the offense together and carried it out. As such, the court imposed identical sentences on each defendant for their conspiracy convictions. This was not improper.

In addition, defendant's sentence was proportionate to the offender. *Bennett*, *supra* at 515. Defendant's presentence investigation report reveals a prior juvenile adjudication for possession of a sawed-off shotgun and an adult conviction for a drug offense. Given defendant's prior contacts with the criminal and juvenile justice systems and given the seriousness of the offense in this case, defendant's sentence was proportionate to the seriousness of circumstances surrounding the offense and the offender. *Id*.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter

McDonald, J. did not participate.